Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1993

PAUL KODAK, F.K.A. SAUL KOZUCK,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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49 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Tax Court's preclusion order pursuant to Tax Court Rule 104(c)(2) for failure to provide discovery is arbitrary and capricious when a petitioner, acting *pro se*, makes a good faith attempt at compliance.

2. Whether two contradictory deficiency determinations for the same tax periods can each be valid when a husband and wife file a joint tax return for the tax years in issue and the Commissioner of the Internal Revenue Service pursues each spouse separately.

PARTIES TO THE PROCEEDINGS BELOW

Paul Kodak f.k.a. Saul Kozuck petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit affirming a judgment of the United States Tax Court. Respondent is the Commissioner of Internal Revenue of the United States.

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OPINIONS BELOW

The opinion of the United States Tax Court, reported at 62 T.C.M. (CCH) 870, T.C.M. (P-H) 91, 485, is set forth in the Appendix at 9a.The judgment of the Third Circuit Court of Appeals was entered November 12, 1993 (3a), as amended February 2, 1994 (1a), an unreported judgment is set forth at 5a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered November 12, 1993, as amended February 2, 1994.

Jurisdiction in this Court is established by 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Tax Court Rule of Practice and Procedure 104. Enforcement action and sanctions

> **(a) Failure to Attend Deposition or to Answer Interrogatories or Respond to Request for Inspection or Production.** If a party, or an officer, director, or managing agent of a party, or a person designated in accordance with Rule 74(b), 75(c), or 81(c) to testify on behalf of a party fails (1) to appear before the officer who is to take such person's deposition pursuant to Rule 74, 75, 67, 81, 82, 83, or 84, or (2) to serve answers or objections to interrogatories submitted under Rule 71, after proper service thereof, or (3) to serve a written response to request for production or inspection submitted under Rule 72 or 73 after proper service of the request, then the Court on

motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraph (b) or (c) of this Rule. If any persons, after being served with a subpoena or having waived such service, willfully fails to appear before the officer who is to take such person's deposition or refuses to be sworn or if any person willfully fails to obey an order requiring such person to answer designated interrogatories or questions, then such failure may be considered contempt of court. The failure to act described in this paragraph (a) may not be excused on the ground that the deposition sought, or the interrogatory submitted, or the production or inspection sought, is objectionable, unless the parties failing to act has theretofore raised the objection, or has applied for a protective order under Rule 103, with respect thereto at the proper time and in the proper manner, and the Court has either sustained or granted or not yet ruled on the objection or the application for the order.

(b) Failure to Answer. If a person fails to answer a question or interrogatory propounded or submitted in accordance with Rule 71, 74, 75, 76, 81, 82, 83, or 84, or fails to respond to a request to produce or inspect or fails to produce or permit the inspection in accordance with Rule 74(b), 75(e), or 81(c), the aggrieved party may, within the time for completion of discovery under Rule 70(a)(2), move the Court for an order compelling an answer response, or compliance with the request, as the case may

be. When taking a deposition on oral examination, the examination may be completed on other matters or the examination adjourned, as the proponent of the question may prefer, before applying for such order.

(c) Sanctions. If a party or an officer, director, or managing agent of a party or a person designated in accordance with Rule 74(b), 75(c), or 81(c) fails to obey an order made by the Court with respect to the provisions of Rule 71, 72, 73, 74, 75, 76, 81, 82, 83, 84, or 90, then the Court may make such orders as to the failure as are just, and among others the following:

(1) An order that the matter regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the case in accordance with the claim of the party obtaining the order.

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such party from introducing designated matters in evidence.

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the case or any part thereof, or rendering a judgment by default against the disobedient party.

> (4) In lieu of the foregoing orders or in addition thereto, the court may treat as a contempt of the Court the failure to obey any such order, and the Court may also require the party failing to obey the order or counsel advising such party or both, to pay the reasonable expenses, including counsel's fees, caused by the failure, unless the Court finds that the failure was substantially justified or that other circumstances made an award of expenses unjust.
>
> (d) **Evasive or Incomplete Answer to Response.** For purposes of this Rule and Rules 71, 72, 73, 74, 75, 76, 81, 82, 83, 84, and 90, an evasive or incomplete answer or response is to be treated as a failure to answer or respond.

Federal Rule of Civil Procedure 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions

> **(a) Motion for Order Compelling Disclosure or Discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an Order compelling disclosure or discovery as follows. . .
>
> **(b) Failure to Comply With Order.**
>
> **(1) Sanctions by Court in District Where Deposition is Taken.** If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the

deposition is being taken, the failure may be considered a contempt of that court.

(2) **Sanctions by Court in Which Action is Pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery including an order made under subdivision (a) of this rule of Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out

> pleadings or other parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. . .

STATEMENT OF THE CASE

A. Statement of Facts

This case involves the determination of the tax liability for Paul Kodak f.k.a. Saul Kozuck ("petitioner") for tax years 1981 through 1985. The petitioner failed to file timely returns for the years in issue. The Commissioner of Internal Revenue ("Commissioner") issued a notice of deficiency for the years at issue on December 9, 1986, determining petitioner's tax liability on the basis of Forms 1099 and income and wage statements provided by the petitioner. On March 9, 1987, the petitioner filed a petition with the United States Tax Court. Petitioner thereafter filed joint returns with his wife for all the tax years in issue by January 3, 1989.[1] On November 28, 1989 the Tax Court entered an order compelling petitioner to object or respond to the Commissioner's Interrogatories and Request for the Production of Documents dated March 28, 1988 and April 1, 1988, which requested, *inter alia,* documents to substantiate petitioner's Schedule A and Schedule C expenses. The order allowed petitioner to respond by December 22, 1989. Petitioner, proceeding *pro se,* forwarded his timely objections to the discovery requests to the court on December 3 and December 9, 1989.

The initial delay in response to the Commissioner's requests

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1. Trial had been calendared for the session beginning June 20, 1988 but was stricken from trial by order of the court dated May 10, 1988.

for documents was occasioned by personal tragedies such as the terminal illness of both Mr. Kodak's daughter and wife. Furthermore, petitioner himself, age 70, was not in the best of health. Kodak explained these problems to the court in his objections to the discovery requests.

On December 14, 1989, the court ordered petitioner to respond to the discovery requests by January 9, 1990 and informed petitioner that the court might impose Rule 104 sanctions should petitioner fail to comply with the order. Petitioner filed an additional Objection to Request for Production of Documents on January 7, 1990. On January 22, 1990, the court granted the Commissioner's motion to exclude evidence if petitioner failed to provide same on or before January 29, 1990. On January 27, 1990, petitioner mailed self-prepared summaries of his Schedule A and Schedule C expenses and adjustments to income. The summaries included specific reference to the claimed deductions and an itemization of supporting check numbers for each category of deduction.

At trial, the petitioner, still acting *pro se*, produced three bags of documentation which were referenced in the summaries produced in an attempt to substantiate his claimed deductions, expenses and adjustments to income. The court refused to allow the material to be entered into evidence. After the short trial, the court found the following tax deficiencies:

Tax Year	Deficiencies
1981	$ 13,093.77
1982	27,826.71
1983	31,178.92
1984	27,365.35
1985	29,208.54

During the pendency of the Tax Court case against petitioner, the Commissioner also sent a notice of deficiency to petitioner's wife, Elaine Kodak, notwithstanding the concession by the Commissioner that the Kodak's were entitled to file joint returns for the years in issue. Elaine Kodak filed a timely petition with the Tax Court. At the time that Elaine Kodak's case was called for trial, Mrs. Kodak was terminally ill and bedridden. The court allowed Paul Kodak to represent his wife in the action. Petitioner again appeared without the assistance of counsel. At Mrs. Kodak's trial, the petitioner successfully entered into evidence the material that had been excluded from his trial. At the conclusion of a trial on the merits, the court found the deficiencies for the same joint return of petitioner to be as follows:

Tax Year	Deficiencies
1981	$ 3,758.10
1982	1,787.55
1983	977.05
1984	1,394.00
1985	1,192.00

B. The Judgment of the Court of Appeals

The United States Court of Appeals for the Third Circuit reviewed the Tax Court decision pursuant to 26 U.S.C. § 7482 and affirmed the judgment without opinion. This appeal was also pursued *pro se* by the petitioner.

REASONS FOR GRANTING THE WRIT

The decision below merits review by this Court because a miscarriage of justice has resulted through the extremely disparate findings of deficiencies in the Tax Court. The petitioner, acting *pro se*, has been penalized for his lack of familiarity with discovery and other legal proceedings. Petitioner's good faith attempt to comply with the Tax Court's order requiring production of substantiation, by preparing and forwarding his own summaries of his deductions, was held inadequate and therefore resulted in the exclusion of petitioner's ample documentation of deductions. Petitioner brought the documents to trial and the court should have, therefore, allowed him to present such substantiation or have been granted an adjournment. The court's failure to do so was arbitrary and capricious in light of the latitude usually afforded *pro se* litigants and in further light of the production of the detailed summaries. By completing and producing these summaries, all information relative to the petitioner's claimed allowances were discovered by the Commissioner with cross-references to supporting documents, such as check numbers. Petitioner, in effect produced work product and did much of the ground work for the Commissioner.

Further, the determination of deficiencies rendered by the Tax Court in petitioner's wife's case demonstrates the magnitude of the miscarriage of justice suffered by the petitioner. As joint filers, the Kodak's were allowed the same deductions against income for the same tax years in question. The modest deficiencies reached in Elaine Kodak's case highlight the inequitable result of petitioner's trial,[2] and, the financial devastation occasioned by the holdings in petitioner's matter.

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2. An appeal of the deficiencies determined by the Tax Court in Elaine Kodak's matter have been appealed by Mrs. Kodak to the Third Circuit.

I.

THE PRECLUSION ORDER WHICH DENIED THE ADMISSION OF PETITIONER'S PROOFS OF DEDUCTIONS AND EXPENSES WAS ARBITRARY, UNWARRANTED AND IN VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS.

Courts have noted that due process rights are violated when the application of discovery sanctions are shown to be arbitrary and that such will render a judgment void. *Brown v. McCormick*, 608 F.2d 410 (10th Cir. 1979); *Arthur Anderson & Co. v. State of Ohio*, 502 F. 2d 834 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974). In applying a legal standard to such discovery sanctions pursuant to the Tax Court Rules of Practice and Procedure, courts have routinely looked to the standards governing the Federal Rules of Civil Procedure. *Hillig v. C.I.R.*, 916 F.2d 171 (4th Cir. 1990); *Crandall v. C.I.R.*, 650 F. 2d 659 (5th Cir. 1981). Furthermore, Tax Court Rule 104(c)(2), the section used to impose sanctions of the petitioner, and Federal Rule of Civil Procedure 37(b)(2)(B) are drafted identically.

In making a determination as to the propriety of such sanctions for failure to comply with a discovery order, courts have recognized a variety of factors relevant to the consideration, including (1) whether the noncomplying party acted in bad faith; (2) the needs of the discovering party; (3) the nature of the noncompliance; (4) whether the noncomplying parties' conduct would deprive the other party of a fair trial; and (5) the need for deterring the particular type of noncompliance.[3]

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3. *See Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 505 (4th Cir.), *cert. denied*, 434 U.S. 1020 (1977); *Hillig, supra* at 174 (citing *Mutual Fed. Sav. & Loan Ass'n v. Richards & Assocs.*, 872 F.2d 88, 92 (4th Cir. 1989).

In this case, the imposition of sanctions under Rule 104 (c)(2) was clearly improper. The *pro se* petitioner attempted to comply with the court order and forwarded a detailed list of all claimed deductions, itemized by category, amount and check number. As such, especially in light of petitioner's inexperience, no justification existed for the harsh sanction which effectively dismissed petitioner's case in light of the presumption of correctness to which the Commissioner's determination of deficiency is accorded. Petitioner attempted to comply with the discovery order and effectively put the Commissioner on notice of all claimed expenses and deductions to be adduced at trial. Therefore, the needs of the discovering party were effectively satisfied and the Commissioner would not be deprived a fair trial by the admission of the checks and documents specifically identified and detailed in petitioner's summary which was generated in a good faith attempt to comply with the court order. Clearly, the preclusion of petitioner's deduction and expense documentation was arbitrary and the judgment should be vacated.

II.

THE SUBSEQUENT CONTRADICTORY JUDGMENT OF THE TAX COURT IN ASSESSING A DEFICIENCY AGAINST PETITIONER'S WIFE RENDERS THE EARLIER JUDGMENT OF THE TAX COURT AGAINST PETITIONER VOID, BECAUSE ENFORCEMENT OF THE EARLIER JUDGMENT WOULD AMOUNT TO A MISCARRIAGE OF JUSTICE.

Petitioner's failure to respond to the discovery order to the satisfaction of the court resulted in the exclusion of numerous deductions and expenses which caused petitioner's deficiency for the five years in issue to amount to $128,673.29. When the documentation was allowed into evidence at the trial involving petitioner's wife, the deficiency for the same tax years amounted to

$9,108.70. The taxpayers filed joint returns and therefore were entitled to the same deductions and allowances for these same tax periods.

Petitioner, nonetheless, is faced with the inequitable situation of owing approximately $250,000 more in his own case (including deficiencies, penalties and interest) than in his wife's case. There currently exists a gross miscarriage of justice which is financially more than petitioner's entire net worth. Petitioner's wife, now deceased, may be liable for nearly $250,000 in tax liability notwithstanding the fact that at her trial on the merits she established to the satisfaction of the Tax Court tax deficiencies for those years of only $9,108.70. While petitioner's wife's estate is not a party to this petition, this fact is mentioned in order to highlight the inequitable result of petitioner's deficiency determination.

Petitioner asserts that the Commissioner should be equitably estopped from enforcing the earlier judgment of deficiency against him due to the result reached in the later Tax Court case as to the tax liability of petitioner as a joint taxpayer to his wife's deficiency determination.

CONCLUSION

It is respectfully submitted that review of the decision below is timely and appropriate. The decision to exclude evidence from petitioner's trial was unduly harsh and is not supportable by the legal standard governing sanctions to be employed for failure to respond to discovery requests. The exclusion, therefore, violated petitioner's due process rights and the judgment should be voided. Furthermore, the enormous discrepancy between the deficiencies assessed against the petitioner in the two Tax Court cases for the same tax years raises the issue of fundamental fairness. A more careful review and discriminating analysis of the decision to exclude the evidence at the tax court and the end result of the later inconsistent judgment is required to accommodate the legitimate issue as to the liability of joint taxpayers in the case of such varying results in deficiency determinations.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner
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New Brunswick, New Jersey 08901
(908) 247-1133

APPENDIX A — AMENDED JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED FEBRUARY 2, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-7656

PAUL KODAK, f/k/a Saul Kozuck,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE

Appeal from the United States Tax Court
Washington, DC
Tax Court No. 5988-87
(Honorable John O. Colvin)

Submitted Under 3rd Circuit LAR 34.1(a)
October 15, 1993

Before: BECKER, SCIRICA and ALITO, *Circuit Judges.*

AMENDED JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the decision of the Tax Court entered August 27, 1992 be and is hereby AFFIRMED.

Appendix A

BY THE COURT:
s/ illegible
Circuit Judge

Attest:
P. Douglas Sisk
P. Douglas Sisk, Clerk

APPENDIX B — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED NOVEMBER 12, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-7656

PAUL KODAK, f/k/a Saul Kozuck,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE

Appeal from the Commissioner of Internal Revenue
No. 87-05988
(Judge: John O. Colvin)

Submitted Under 3rd Circuit LAR 34.1(a)
October 15, 1993

Before: BECKER, SCIRICA and ALITO, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court entered August 27, 1992 be and is hereby AFFIRMED.

Appendix B

BY THE COURT:
s/ illegible
Circuit Judge

Attest:
P. Douglas Sisk
P. Douglas Sisk, Clerk

[stamped]
RECEIVED AND FILED
12-6-93 CPM
P. DOUGLAS SISK,
CLERK

APPENDIX C — DECISION OF THE UNITED STATES TAX COURT ENTERED JULY 22, 1993

UNITED STATES TAX COURT

Docket No. 8666-91

ESTATE OF ELAINE KODAK, DECEASED PAUL KODAK, EXECUTOR,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the opinion of the Court filed July 2, 1992, and incorporating herein the facts recited in respondent's computation as the finding of the Court, it is

ORDERED AND DECIDED: That there are deficiencies in income tax due from the petitioner for the taxable years 1981, 1982, 1983, 1984 and 1985 under the provisions of I.R.C. § 6653(a)(1), in the amounts of $3,758.10, $1,787.55, $977.05, $1,394.00 and $1,192.00, respectfully;

That there are additions to tax due from the petitioner for the taxable years 1981, 1982, 1983, 1984 and 1985 under the provisions of I.R.C. § 6653(a)(1), in the amounts of $746.51, $677.77, $1,013.20, $525.75 and $467.99, respectively;

Appendix C

That there are additions to tax due from the petitioner for the taxable years 1981 and 1983, under the provisions of I.R.C. § 6653(a)(2), in an amount equal to 50 percent of the statutory interest due on $2,704.23 for the taxable year 1981 and $103.86 for the taxable year 1983 from the date of assessment of the tax or, if earlier, the date of payment of the tax;

That there are additions to tax due from the petitioner for the taxable years 1981 and 1983, under the provisions of I.R.C. § 6651(a)(1) in the amount of $50.97 and $25.97, respectively;

That there are no additions to tax due from the petitioner for the taxable years 1982, 1984 and 1985 under the provisions of I.R.C. § 6651(a)(1); and

That there are no additions to tax due from the petitioner for the taxable years 1982, 1983, 1984 and 1985 under the provisions of I.R.C. § 6661.

(Signed) John O. Colvin
Judge.

Entered: JUL 22 1993

APPENDIX D — DECISION OF THE UNITED STATES TAX COURT ENTERED AUGUST 27, 1992

UNITED STATES TAX COURT

Docket No. 5988-87

PAUL KODAK, f.k.a SAUL KOZUCK,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the opinion of the Court filed September 30, 1991, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there are deficiencies in income taxes due from the petitioner for the taxable years 1981, 1982, 1983, 1984 and 1985 in the amounts of $13,093.77, $27,826.71, $31,178.92, $27,365.35 and $29,208.54, respectively;

That there are additions to the tax due from the petitioner for the taxable years 1981, 1982, 1983, 1984 and 1985 in the amounts of $3,009.98, $2,757.50, $2,754.68, $5,785.19 and $4,317.39, respectively, under the provisions of I.R.C. § 6651(a)(1);

That there are additions to the tax due from the petitioner for

the taxable years 1981, 1982, 1983, 1984 and 1985 in the amounts of $1,213.29, $1,391.34, $1,558.95, $1,824.31 and $1,460.43, respectively, under the provisoins of I.R.C. § 6653(a)(1);

That for the purpose of computing the 50% addition to the tax pursuant to I.R.C. § 6653(a)(2) for the taxable years 1981, 1982, 1983, 1984 and 1985, the addition to the tax shall be computed on $12,039.90, $11,029.97, $11,018.69, $29,208.54 and $23,140.75, respectively;

That there are no additions to the tax due from the petitioner for the taxable years 1982, 1983 and 1984, under the provisions of I.R.C. § 6661; and

That there is a penalty due to the United States from the petitioner, under the provisions of I.R.C. § 6673(a) in the amount of $3,500.00.

(Signed) John O. Colvin
Judge.

Entered: AUG 27 1992

ABRAHAM N. M. SHASHY, JR.
Chief Counsel
Internal Revenue Service

By: s/ Francis J. Strapp, Jr.
FRANCIS J. STRAPP, JR.
Assistant District Counsel
Tax Court I.D. #SF0255
970 Broad Street - Room 904
Newark, New Jersey 07102
Tel. No. (201) 645-3083

DATED: January 24, 1992

APPENDIX E — TAX COURT MEMO 1991-485 FILED SEPTEMBER 30, 1991

T.C. Memo. 1991-485

UNITED STATES TAX COURT

PAUL KODAK, F.K.A. SAUL KOZUCK, Petitioner *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 5988-87. Filed September 30, 1991.

Paul Kodak, f.k.a. Saul Kozuck, pro se.

Ismael Gonzalez, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

COLVIN, *Judge*: Respondent determined deficiencies in and additions to petitioner's Federal income tax as follows:

		Additions to Tax			
Year	Deficiencies	Sec. 6651(a)(1)	Sec. 6653(a)(1)	Sec. 6653(a)(2)	Sec. 6661
1981	$29,444.86	$7,361.21	$1,472.24	*	—
1982	32,084.86	8,021.21	1,604.24	*	$2,905.54
1983	36,697.38	9,174.34	1,834.87	*	3,335.94
1984	42,500.57	10,625.14	2,125.03	*	3,814.91
1985	34,292.12	8,573.03	1,714.61	*	—

* 50% of the interest due on $29,444.86 for 1981, $32,084.86 for 1982, $36,697.38 for 1983, $42,500.57 for 1984, and $34,292.12 for 1985.

Appendix E

After concessions,[1] the issues for decision are:

1. Whether respondent's deficiency determinations for petitioner's taxable years 1981 through 1985 are correct. We hold that they are.

2. Whether petitioner can claim an additional exemption for his son in 1981. We hold that he may not.

3. Whether petitioner is liable for additions to tax: (a) For failure to timely file returns under section 6651(a)(1); (b) for negligence under section 6653(a)(1) and (2) for the years in issue; and (c) for additions to tax for substantial understatement of income tax pursuant to section 6661 for 1982, 1983, and 1984. We hold that he is liable for these additions to tax for the years determined by respondent.

4. Whether petitioner is liable for a penalty under section 6673 for unreasonably failing to pursue available administrative remedies. We hold that he is.

All section references are to the Internal Revenue Code of 1954 as amended and in effect for the years at issue. All Rule references are to the Tax Court Rules of Practice and Procedure.

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1. Petitioner conceded on brief that he is liable for the self-employment tax for the years in issue. Respondent conceded on brief that petitioner is entitled to use the married filing jointly rates for all of the years at issue.

Appendix E

FINDINGS OF FACT

Some facts were stipulated by the parties and are so found. Some facts relating to the procedural history of the case are found based on uncontroverted representations made in procedural motions and responses filed by the parties.

1. *Petitioner*

Petitioner Paul Kodak (f.k.a. Saul Kozuck) resided in East Orange, New Jersey, when his petition was filed.

Petitioner holds a master of business administration degree from New York University. During the years at issue, he worked as a mechanical engineer for several corporations. Payments by the corporations were reported to petitioner on Forms 1099. He also worked part time as an insurance agent.

Petitioner made timely estimated tax payments during the years in issue. He believed that he owed no or very little tax due to the estimated payments made.

2. *Procedural History*

Petitioner sent letters dated August 13, 1985, December 26, 1985, and August 10, 1986, to the Brookhaven Service Center in Holtsville, New York, requesting additional time to file his returns for the years in issue. His reason for the request was that he had been "heavily engaged in overtime work on urgent defense material and in time absorbing litigation." He promised to try to complete the 1981 and 1982 returns by the end of 1985, and the 1983 and 1984 returns by mid-April 1986.

Appendix E

On July 25, 1986, the Internal Revenue Service Examination Group sent a letter to petitioner indicating he failed to respond to nine computer notices and a request to provide Forms W-2 or Forms 1099 for the tax years 1981 through 1985. The letter requested that petitioner submit to respondent all Forms W-2, Forms 1099, and other income documents by August 15, 1986. At that time petitioner had not filed income tax returns for those years.

On August 11, 1986, petitioner wrote to respondent's Revenue Officer, Janet B. Williams, and enclosed certain income tax documents, including several Forms 1099, for the tax years in issue. Petitioner indicated in this letter that he had not included documentation of tax deferred income from retirement, Keogh, and IRA plans.

On October 3, 1986, the Examination Group sent a letter to petitioner requesting an appointment to discuss his failure to file returns. Petitioner did not appear for the appointment.

On November 4, 1986, petitioner wrote to the Examination Group requesting a conference with the Appeals Division.

On December 4, 1986, the Examination Group wrote to petitioner indicating it could not honor his request for an appeals conference because he had not submitted the information concerning his unfiled returns for 1981 through 1985 it had previously requested.

On December 9, 1986, respondent issued the notice of deficiency for the years at issue. Respondent determined petitioner's tax liability for each of the years at issue on the basis of income from wage statements and Forms 1099, some of which were provided to the Internal Revenue Service by petitioner.

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Respondent determined petitioner's filing status to be single and allowed petitioner one exemption. Respondent later conceded that petitioner is entitled to file joint returns for the years at issue.

Petitioner filed a return for 1981 on January 22, 1987. Petitioner claimed an exemption for his 26 year old son Jack on his 1981 return.

On March 9, 1987, petitioner filed his petition.

On July 2, 1987, the Appeals Office wrote to petitioner scheduling a conference for July 22, 1987. On July 15, 1987, petitioner telephoned the Appeals Office to cancel the conference because he needed more time.

On October 3, 1987, the Appeals Office sent to petitioner a request for documents to substantiate his Schedule A and Schedule C expenses for 1981. The appeals conference was rescheduled for October 8, 1987. Petitioner attended the conference, but he provided no documents previously requested to substantiate these expenses. Petitioner indicated he needed additional time to provide the documentation requested and to file his returns for 1982, 1983, 1984 and 1985.

On February 9, 1988, April 22, 1988, April 26, 1988, and May 3, 1988, District Counsel Attorney Geraldine Eure sent letters to petitioner attempting to arrange a Branerton conference, to aid petitioner in the preparation of his returns, requesting documents, and attempting to arrange a telephone conference with the Court.

Petitioner filed a return for 1982 on March 2, 1988.

This case was calendared for trial for the session beginning

June 20, 1988, but was stricken from trial by another Division of this Court by Order dated May 10, 1988.

Petitioner filed returns for 1983, 1984, and 1985 on June 27, 1988, September 21, 1988, and January 3, 1989, respectively.

On September 13, 1989, and October 19, 1989, a copy of the Court's standing pretrial order was sent to petitioner. Petitioner had failed to notify the Court of his change of address.

On October 20, 1989, respondent wrote to petitioner asking him to respond to the Interrogatories and Request for Production of Documents sent to him on March 28, 1988, and April 1, 1988, respectively.

On November 24, 1989, respondent filed a Motion to Compel Production of Documents. The Court issued an order dated November 28, 1989, giving petitioner until December 22, 1989, to object or produce those documents for respondent.

Petitioner mailed letters to the Court dated December 3 and December 9, 1989, which the Court filed as Petitioner's Objections to Respondent's Motion. In the letters petitioner contended that he had consistently made overpayments of taxes during the years in issue and therefore owed no tax. The letters also contained a detailed description of his daughter's very serious illness.

The Court issued an Order, dated December 14, 1989, ordering petitioner to produce for respondent copies of documents previously requested. The December 14, 1989, order extended the previous December 22, 1989, deadline to January 9, 1990. The December 14, 1989, order also indicated that the Court might impose sanctions pursuant to Rule 104 if petitioner failed to comply with the Order.

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Petitioner submitted an Objection to Request for Production of Documents, dated January 7, 1990.

On January 19, 1990, respondent sent a proposed Stipulation of Facts to petitioner.

On January 22, 1990, respondent filed a Motion To Impose Sanctions pursuant to Rule 104(c).

By order dated January 22, 1990, we granted respondent's motion to exclude evidence previously requested by respondent which petitioner failed to provide to respondent on or before January 29, 1990.

On January 29, 1990, petitioner filed a Motion Requesting Removal of Order To Exclude Evidence, in which petitioner stated that he had complied with this Court's January 22, 1990, order by mailing two separate packages of documents to respondent on January 27, 1990.

Respondent received various documents from petitioner on January 30, 1990, in response to the Court's Order. Petitioner submitted summaries of his alleged Schedule A and Schedule C expenses and adjustments to income, as well as 22 employment rejection letters, 1979 news articles and correspondence with the U.S. Department of Energy, United States Senator Bradley, New York City Mayor Edward Koch, and New Jersey Governor Byrne on "The Kodak Emergency Plan for Removal of Long Gas Lines" and a poem entitled "Working, Working, Never Shirking, That's Ole Saul Kozuck."

On February 2, 1990, respondent filed an Objection to Petitioner's Motion Requesting Removal of the Court's Order to

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Exclude Evidence. Respondent cited petitioner's failure to comply with the Court's November 28, 1989, and January 22, 1990, orders to provide documents substantiating his expenses and deductions.

On February 6, 1990, respondent wrote to petitioner indicating that respondent was considering asking for a penalty under section 6673 for petitioner's delay and failure to pursue available administrative remedies. At trial, respondent moved for the imposition of a penalty pursuant to section 6673.

Petitioner submitted three shopping bags of material at trial, but they were not admitted in evidence.

At trial, petitioner testified, but called no other witnesses.

3. *Petitioner's Income and Deductions*

The following is a schedule of petitioner's income for the tax years 1981 through 1985 as stipulated by the parties:

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	1981	1982	1983	1984	1985
Income Per Return					
Schedule C-Husband	$62,559.77[2]	$74,362.79	$87,053.79	$97,911.39	$83,528.17
Interest	3,835.62	301.12	1,871.38	2,195.23	1,647.50
Dividends	139.54	1,452.29	1,699.33	2,753.21	2,615.17
Capital Gains	21.99	6.02	—	6.33	5.64
Schedule C-Wife	—	2,000.00	2,000.00	2,000.00	2,000.00

2. Although the parties stipulated that the Schedule C income for petitioner was $62,599.77, the amount shown on the return is $62,559.77, and that is the figure we will use.

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The following is a schedule of petitioner's claimed Schedule A expenses in dispute for the tax years 1981 through 1985:

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	1981	1982	1983	1984	1985
Schedule A Expenses					
Itemized Deductions:					
Medical	$3,367.11	$3,228.50	$1,755.74	$4,627.09	$4,848.52
Taxes	1,339.80	3,170.19	1,895.41	3,054.91	3,405.42
Interest	464.40	453.91	412.91	291.87	250.07
Contributions	261.00	268.00	293.00	1,007.00	507.00
Miscellaneous	58.00	61.00	61.00	65.00	67.00
Zero Bracket Amount	<3,400.00>	<3,400.00>	<3,400.00>	<3,400.00>	<3,540.00>
	$2,090.31	$3,781.60	$1,018.06	$5,645.87	$5,538.01

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The following is a schedule of petitioner's claimed Schedule C expenses in dispute for the tax years 1981 through 1985:

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	1981	1982	1983	1984	1985
Schedule C Expenses:					
Car & Truck	$5,932.94	$7,917.46	$5,346.69	$5,562.67	$5,368.01
Depreciation	1,294.52	1,675.10	1,815.12	1,920.08	2,526.23
Office Supplies	696.81	1,188.99	1,110.46	711.86	1,547.81
Rent Expenses	1,348.80	1,808.46	1,855.97	1,966.84	2,054.05
Travel & Entertainment	1,521.24	1,269.46	1,303.97	2,014.87	2,460.55
Telephone	369.04	406.66	597.33	490.82	463.21
Secretary	2,000.00	2,000.00	2,000.00	2,000.00	—
Total	$11,163.35	$16,266.13	$14,029.54	$14,667.14	$14,419.86

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The following is a schedule of petitioner's adjustments to income in dispute for the tax years 1981 through 1985:

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	1981	1982	1983	1984	1985
Adjustments to Income					
Bad Debt	$ 5,024.00	$—	$—	$—	$—
IRA Contribution	1,750.00	4,000.00	4,000.00	4,000.00	4,000.00
Keogh Payments	7,500.00	9,437.40	12,039.61	45,724.00	38,696.00
Total	$14 274.00	$13,437.40	$16,039.61	$49 724.00	$42 696.00
Exemption - Son	$ 1,000.00				

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OPINION

This is essentially a substantiation case. Respondent's determinations in the notice of deficiency are presumed correct, and petitioner bears the burden of proving otherwise. *Welch v. Helvering*, 290 U.S. 111, 115 (1933); Rule 142(a).

1. *Exclusion of Evidence*

Respondent requested that petitioner furnish income tax information and substantiation for the deductions he claimed. These requests were made in July 1986, October 1987, February, April, and May 1988, and October 1989. Petitioner repeatedly failed to provide documents to respondent. On November 28, 1989, and December 14, 1989, we ordered petitioner to produce copies of documents previously requested by respondent, but petitioner failed to comply. On January 22, 1990, we ordered the exclusion of evidence which petitioner failed to provide by January 29, 1990. Petitioner submitted numerous documents, including summaries of his expenses and deductions, but provided no receipts, charge slips, bills, or other underlying documentation.

At trial petitioner sought to move into evidence three shopping bags of materials. Respondent objected on the grounds that it violated our January 22, 1990, order. Relevant material petitioner provided to respondent on January 30, 1990, in substantial compliance with our order to produce by January 29, 1990, was admitted. Material not so provided was not admitted. Rule 104(c)(2); *Gleason v. Commissioner*, T.C. Memo. 1990-110; see *Freedson v. Commissioner*, 565 F.2d 954 (5th Cir. 1978), affg. 65 T.C. 333 (1975) and 67 T.C. 931 (1977); *McCoy v. Commissioner*, 76 T.C. 1027 (1981), affd. 696 F.2d 1234 (9th Cir. 1983).

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Petitioner chose not to timely file returns. He apparently failed to maintain complete and organized records. Petitioner was given numerous chances to submit documentation to substantiate his deductions, but chose not to do so. He failed to comply with several Court orders to produce documents. Petitioner's willful failure to comply with respondent's discovery requests and these Court orders led to the exclusion from evidence of the three shopping bags of material. *Gleason v. Commissioner,* T.C. Memo. 1990-110; *May v. Commissioner,* T.C. Memo. 1981-119.

2. *Petitioner's Claimed Deductions*

No evidence was admitted which convinces us that petitioner met his burden of proof for his claimed Schedule A and C expenses and adjustments to income. Much of the evidence petitioner offered consisted of irrelevant and self-serving documents. Petitioner's work papers and expense summaries were wholly uncorroborated. No receipts, charge slips, bills, or other underlying documentation were admitted to substantiate his alleged payment of auto repairs, tolls, parking, rent, phone, stamps, post office box rental, travel and entertainment, car and truck, office, and medical expenses.

Petitioner in effect forfeited his right to offer corroborative evidence at trial due to his failure to comply with several Court orders. At trial petitioner was forced to rely on his tax returns, his testimony, and the evidence described above which he had provided to respondent in response to Court orders. Petitioner urged this Court to accept his work papers as adequate to substantiate his expenses. We are not obligated to accept a taxpayer's self-serving, uncorroborated testimony, *Geiger v. Commissioner,* 440 F.2d 688, 689 (9th Cir. 1971), affg. T.C. Memo. 1969-159, or work papers in lieu of receipts, checks, and other documentation.

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Deductions are a matter of legislative grace. Petitioner has the burden of establishing that he is entitled to the deductions claimed. *New Colonial Ice Co. v. Helvering,* 292 U.S. 435, 440 (1934). A taxpayer must substantiate the payments which give rise to claimed deductions. *Hradesky v. Commissioner,* 65 T.C. 87, 90 (1975), affd. per curiam 540 F.2d 821 (5th Cir. 1976); sec. 6001.

We have long held that where the taxpayer does not substantiate claimed deductions, the Commissioner is not arbitrary or unreasonable in denying them. *Roberts v. Commissioner,* 62 T.C. 834, 836-837 (1974); *Pfluger v. Commissioner,* T.C. Memo. 1986-78, affd. 840 F.2d 1379, 1383 (7th Cir. 1988). Moreover, absent documentation by petitioner, we note that the record in this case provides no basis for making a determination under *Cohan v. Commissioner,* 39 F.2d 540, 544 (2d Cir. 1930). *Lerch v. Commissioner,* 877 F.2d 624, 628-629 (7th Cir. 1989), affg. T.C. Memo. 1987-295; *Lutheran Mutual Life Insurance Co. v. United States,* 816 F.2d 376, 379 (8th Cir. 1987); *Bay Sound Transportation Co. v. United States,* 410 F.2d 505, 511 (5th Cir. 1969).

3. *Dependency Exemption*

Petitioner claimed an exemption for his 26-year old son Jack in 1981. To be entitled to claim his son as a dependent under section 152(a), petitioner must establish that he provided over one-half of Jack's support in 1981. The burden is on petitioner to show that those amounts exceeded one-half of his support for 1981. *Hopkins v. Commissioner,* 55 T.C. 538, 541 (1970); *Seraydar v. Commissioner,* 50 T.C. 756, 761 (1968). Petitioner failed to show any support he provided his son in 1981. Therefore, we find that petitioner has not met his burden of proving he is entitled to an exemption for his son for 1981.

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4. *Additions to Tax*

a. *Failure to File Timely Returns*

Respondent determined that petitioner is liable for an addition to tax for failure to file a timely return for tax years 1981 to 1985.

Section 6651(a)(1) imposes an addition to tax for failure to file a timely tax return, unless it is shown that such failure is due to reasonable cause and not due to willful neglect. *Richardson v. Commissioner,* 72 T.C. 818, 826-827 (1979). The burden of proof is on petitioner to show that the failure is due to reasonable cause and not willful neglect. *United States v. Boyle,* 469 U.S. 241, 245 (1985); *Davis v. Commissioner,* 81 T.C. 806, 820 (1983), affd. without published opinion 767 F.2d 931 (9th Cir. 1985).

Petitioner did not file returns for the years in issue until 3 to 4 years after their due dates. Although he wrote numerous letters requesting extensions of time to file his returns for years 1981 through 1985, no extensions were granted. Petitioner was well aware of his responsibility to file returns as evidenced by his timely filing of estimated tax declarations. His assumption that he owed no tax, stated in numerous letters to respondent, is no excuse for his delinquent filing of returns. Petitioner has not convinced us that his failure to file timely returns was due to reasonable cause and not to willful neglect.

Consequently, we hold he is liable for the addition to tax for late filing under section 6651(a)(1) for the years in issue.

b. *Negligence*

Respondent determined that petitioner is liable for additions

to tax for negligence under section 6653(a)(1) and (2) for the years in issue.

Section 6653(a)(1) imposes an addition to tax equal to five percent of the underpayment if any part of an underpayment is due to negligence or intentional disregard of rules and regulations. Section 6653(a)(2) imposes an additional liability of 50 percent of the interest due on the underpayment of tax attributable to negligence or intentional disregard of rules and regulations.

Petitioner bears the burden of proving that respondent's determination that he was negligent or intentionally disregarded the rules and regulations for each of the years in issue was erroneous. *Bell v. Commissioner,* 85 T.C. 436, 441 (1985); *Warrensburg Board & Paper Corp. v. Commissioner,* 77 T.C. 1107, 1112 (1981); *Bixby v. Commissioner,* 58 T.C. 757, 791-792 (1972).

Negligence is defined as a lack of due care or failure to do what a reasonable and ordinarily prudent person would do under the circumstances. *Zmuda v. Commissioner,* 731 F.2d 1417, 1422 (9th Cir. 1984), affg. 79 T.C. 714 (1982); *Neely v. Commissioner,* 85 T.C. 934, 947 (1985).

Petitioner was aware of his duty to file income tax returns and pay taxes on his wage income as evidenced by his estimated tax payments during the years in issue. However, petitioner did not file returns for the 5 years in issue until after he received statutory notices of deficiency. Petitioner also failed to show that he maintained adequate records to substantiate the deductions claimed. Sec. 6001. Petitioner also failed to cooperate with respondent throughout the pendency of this case. *Emmons v. Commissioner,* 92 T.C. 342, 350 (1989), affd. 898 F.2d 50 (5th Cir. 1990). Accordingly, we hold that petitioner is negligent and liable for the additions to tax under section 6653(a)(1) and (2).

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c. *Substantial Understatement*

Respondent determined that petitioner is liable for additions to tax for 1982, 1983, and 1984 pursuant to section 6661 because he substantially understated his income tax. Section 6661 imposes an addition to tax at a rate of 25 percent of the amount of any underpayment attributable to a substantial understatement of income tax. A substantial understatement exists if the amount of the understatement exceeds the greater of 10 percent of the tax required to be shown on the return for the taxable year or $5,000. Sec. 6661(b)(1)(A).

Petitioner substantially understated his income tax pursuant to section 6661(b) for 1982, 1983, and 1984, and is therefore liable for the addition to tax under section 6661(a). After taking into account petitioner's prior estimated tax payments, petitioner's underpayments for purposes of section 6661 will be computed under Rule 155.[3]

5. *Proceedings Instituted Primarily For Delay*

Section 6673 states that this Court may impose a penalty not in excess of $25,000 when prdceedings have been instituted or maintained primarily for delay, where the taxpayer's position is frivolous or groundless, or where the taxpayer unreasonably fails to pursue available administrative remedies.

Respondent argues that petitioner instituted and maintained this case primarily for the purpose of delay and that he unreasonably failed to pursue available administrative remedies.

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3. For purposes of determining underpayments under sec. 6661, these amounts were reduced by the amount of taxes previously paid by petitioner. See *Woods v. Commissioner*, 91 T.C. 88 (1988).

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We believe the facts of this case are similar to those in *Birth v. Commissioner,* 92 T.C. 769, 770, 774-775 (1989), in which this Court awarded damages under former section 6673 for the taxpayers' unreasonable failure to pursue available administrative remedies. In *Birth,* the taxpayers refused to attend an audit and failed to substantiate deductions for expenses allegedly incurred in their business activities.

In the instant case, petitioner repeatedly ignored respondent's requests for production of documents, and failed to respond or cooperate in respondent's audit. Despite his attempts to place the blame for his tax problems on respondent, petitioner has no one to blame but himself for his late filing of returns, his failure to keep complete and adequate records, and his failure to provide substantiation in response to respondent's requests. This is a substantiation case that could have been resolved at the audit stage had petitioner been willing to pursue administrative remedies. Accordingly, we require petitioner to pay a penalty of $3,500 to the United States for petitioner's unreasonable failure to pursue available administrative remedies.

To reflect concessions,

Decision will be entered

under Rule 155.